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NO. 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE HARTFORD STEAM BOILER INSPECTION AND
INSURANCE COMPANY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 20a-29a) is not officially reported (12 WH Cases 498). The opinion of the Court of Appeals is reported at 235 F. 2d 942.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED

Does Section 7(e) of the Fair Labor Standards Act, as amended, require that there be a reasonable relationship between the number of hours for which pay is guaranteed

under individual guaranteed wage contracts and the number of hours customarily worked by the employees paid under such contracts?

STATEMENT

On February 10, 1942, the United States Labor Department ruled that the insurance business was subject to the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201 *et seq.*). Thereupon, and repeatedly over the following four years, exhaustive investigations were conducted by the Wage and Hour Division at several of the respondent's offices in various states, as a result of which the respondent's inspectors were held to be exempt from the provisions of the Fair Labor Standards Act as administrative employees (Sec. 13(a)(1)). However, as a result of a later investigation, begun in 1946 at the respondent's Chicago Branch Office, these rulings were reversed and the inspectors were held not to qualify as administrative employees on the ground that they did not exercise sufficient independent judgment and discretion. Respondent sought to resolve the confusion thereby created by seeking a decision from the Administrator in Washington and after protracted negotiations, conferences and briefs, the latter on September 7, 1950 concluded that these employees were not exempt for the reason above stated.

At about this time the Act was amended *inter alia* to permit, specifically, guaranteed wage contracts with employees whose duties necessitated irregular hours of work (Sec. 7(e)) . As the nature of the inspector's duties necessitated irregular hours of work, the respondent, though of opinion that its employees' duties were administrative, rather than submit to the loss of time, expense and inconvenience involved in and the hazards of litigation, accepted

the ruling and entered into individual contracts with each of its inspectors, contracts which specified a regular rate of not less than the minimum permitted by the Act for the first forty hours, one and one-half times that rate for hours in excess of forty and provided a weekly guarantee of pay for sixty hours. In each case the contract followed the wording of the statute and in each case the specified rate in the contract bore a logical and reasonable relationship to the guaranteed wage, the rate being that required to produce the agreed compensation on the basis of a sixty-hour workweek.[1]

But this action on respondent's part was far from satisfactory to the petitioner. A series of investigations was conducted at the respondent's home office, employment records of all inspectors were minutely examined and innumerable conferences held in which petitioner insisted that, despite the fact that the number of hours in any workweek could never be determined with any certainty being dependent solely on fortuitous circumstances wholly beyond the control of the respondent and its employees, the guarantee in each contract should nevertheless be fixed at a number of hours which would be exceeded in a "significant" number of weeks, significant number in the view of the petitioner

[1]Contrast the situation in *McComb* v. *Roig*, 181 F. 2d 726 (1st Cir. 1950), heavily relied on by petitioner in his brief and argument both in the District Court and in the Court of Appeals. In that case all employees were listed at the same hourly rate of 47¢ but their weekly guarantees varied from $24 to $40. There was no logical or reasonable relationship between the weekly guarantee and the specified hourly rate and thus the latter was merely an artificial contrivance which did not set the regular rate at which the employee was employed. Furthermore, when employees from time to time received wage increases in the form of increases in their weekly guarantee the hourly rate remained unchanged.

being 20%. This proposal was wholly unsatisfactory not only to the respondent but to its employees, all of whom desired a stable wage and none of whom, though they were permitted to do so under Section 16(b) of the Act, sought to upset their contracts. Petitioner thereupon, taking up the cudgels for these satisfied employees, instituted suit in the District Court for the District of Connecticut seeking to enjoin respondent from an alleged violation of the Act on the ground that the rates specified in the contracts were fictitious because the guarantee was so seldom exceeded. Respondent answered that the contracts conformed in all respects to the requirements of Section 7(e) and further that the employees in question, performing administrative duties, were exempt from its provisions in any event. The District Court ruled the contracts in conformity with the Act and therefore valid. With respect to exemption, however, while the Court agreed with respondent that sufficient independent judgment and discretion were exercised by the employees to gain administrative status (petitioner's long insistence to the contrary notwithstanding), it found nevertheless that certain other highly technical criteria established by the administrative regulations precluded such classification. The Court of Appeals affirmed the judgment dismissing the action. It did not, however, rule on the exemption issue, a determination in respect thereof being unnecessary.

In his petition for certiorari the petitioner, who heretofore has relied primarily on a construction of this Court's decisions rendered prior to the 1949 amendments and allegedly incorporated therein, a construction which circuit after circuit has held incorrect, now shifts his emphasis and seeks to engraft on the clear and unambiguous language of Section 7(e) a refinement on the meaning of the term "regu-

lar rate" utilizing as his weapon therefor a definition of this term set forth in Section 7(d). He bolsters this effort with claims having no support in the record, viz., that unemployment was rife at the time of the amendments, that the use of guaranteed wage contracts has become commonplace in a wide variety of occupations. He sprinkles his argument with a liberal use of such words as "evasive" and "fictitious", and endeavors to escape from Section 7(e)'s legislative history by involved reasoning which serves only to compound the confusion which Congress sought to eliminate.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT ISSUE

1. There is no conflict in the Courts of Appeals on the question now before this Court.

Each Court of Appeals which has ruled on the question, viz., the 8th, 1st, 5th and 2d Circuits, has rejected petitioner's argument that the use of the term "regular rate" in Section 7(e) was intended by Congress to impose a limitation on the use of guaranteed wage contracts and to restrict their validity to situations where employees work a number of hours in excess of the guarantee period in a "substantial portion" or "significant" number of work weeks. *Tobin* v. *Little Rock Packing Co.*, 202 F. 2d 234 (8th Cir. 1953), cert. den. 346 U. S. 832 (1953); in this case no employee ever exceeded the guarantee. *Mitchell* v. *Brandtjen & Kluge, Inc.*, 228 F. 2d 291 (1st Cir. 1955); "It would * * * be unwarranted judicial legislation on our part to read into Section 7(e) another requirement (significant number of workweeks) which the Congress chose not to put there". *Mitchell* v. *Adams*, 230 F. 2d 527 (5th Cir. 1956); "This (petitioner's claim) misreads both the *Belo* decisional law and the specific 1949 Amendment and is again the

search for handy, arbitrary, rule-of-thumb criteria, displacing inquiry and deliberative judgment, leaving it all to the wisdom of the Administrator". And *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co.*, 235 F. 2d 942 (2d Cir. 1956). "We think the Secretary's contention that Congress intended to impose a 'significant number of work weeks' test on guaranteed wage plans, which in all other respects comply with Section 7(e), is an incorrect interpretation of the Act."

2. There is no conflict between the foregoing decisions of the Courts of Appeals and the decision of this Court rendered prior to the amendment.

This Court on only two occasions has ruled on the validity of guaranteed wage contracts. Both decisions predated the 1949 amendments and both upheld their validity. *Walling* v. *Belo Corp.*, 316 U. S. 624 (1942) and *Walling* v. *Halliburton Co.*, 331 U. S. 17 (1947). In neither case did this Court adopt or approve the so-called significant number of workweeks test which petitioner urges as the criterion of validity. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572 (1942), handed down on the same day as the *Belo* decision, established the standard definition of the term "regular rate", namely, compensation earned divided by the number of hours worked to earn it. But this "regular rate" is not the same as the regular rate which this Court in *Belo* said could be specified by a guaranteed wage contract. The field of guaranteed wage contracts has always constituted a recognized exception to this general concept of regular rate and the various Supreme Court cases cited by petitioner, viz., *Walling* v. *Helmerich & Payne,* 323 U. S. 37 (1944); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419 (1945); and *Walling* v. *Harnischfeger Corp.*,

325 U. S. 427 (1945), all recognized *Belo* as an exception to the usual rule and did no more than narrow its application. In none of them, as in this case, was a guaranteed wage contract of the *Belo* type involved.

3. The clear-cut language of Section 7(e) and its legislative history establish beyond peradventure the validity of the Court of Appeals' construction.

In 1949 Congress considered the matter of revision of the Fair Labor Standards Act. Before it were three bills: (1) expressly outlawing guaranteed wage contracts, (2) permitting their use subject to specific limitations including a "significant number of workweeks" test (the Lesinski Bill), and (3) permitting their use without limitation as to the relation between hours worked and hours guaranteed (the Lucas Bill). The adoption of the third alternative *strongly opposed by the Department of Labor* in preference to the first or second *strongly advocated by the Department* clearly indicates Congressional approval of guaranteed wage contracts without the limitation urged by petitioner. Despite this violent opposition to the Lucas Bill and strenuous advocacy of the Lesinski Bill, petitioner now says in effect that the two bills mean the same thing and in support of this inconsistency urges:

First, that because the Section 7 amendments were such a small part of both bills no inference should be drawn from the rejection of the Lesinski Bill. Small part or no, Congress was abundantly aware of the case law, the confusion therein, and the need for clarification. And, petitioner's statement to the contrary notwithstanding, the divergent provisions as to guaranteed wage contracts in the two bills were discussed, and debated,[2] and the Depart-

ment's favorite, the Lesinski Bill, rejected—in sum a clear rejection of the Department's unwise effort to limit the validity of guaranteed wage contracts by imposing indefinite and impractical standards.

Second, that the use of the phrase "regular rate of pay" in Section 7(e) made it unnecessary to spell out the specific limitations included in the Lesinski Bill. This is based on the argument, fallacious on its face, that the definition of "regular rate" in Section 7(d) is applicable to Section 7(e). Section 7(d) defines "the 'regular rate' at which an employee is employed" to include all remuneration paid except payments made for "occasional periods when no work is performed . . . ." In the next breath petitioner says that in only 20% of the workweeks must the guarantee be exceeded, leaving 80% of workweeks when it may not. Thus in four out of every five weeks the regular rate may include remuneration paid for periods when no work was performed. We find it difficult to apply to this situation the adjective "occasional".

The simple answer is that the term "regular rate" as defined in Section 7(d) is not the regular rate that the parties may specify by contract under Section 7(e). If the Section 7(d) definition is applied in a situation where there is a constant guaranteed wage and a varying number of hours in the workweek, the resultant "regular rate" would vary from week to week. In contrast the regular rate which may be specified under Section 7(e) remains constant.

It is high time that petitioner recognize what has long been recognized by the courts that the field of guaranteed

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[2] 95 Congressional Record 11445 (August 10, 1949); 95 Congressional Record 12588 (August 27, 1949).

wage contracts is "one which constitutes an exception to the usual rule".[3]

4. Petitioner's interpretation of Section 7(e) precludes the wage stability sought and desired by employer and employee alike.

In the *Belo* case this Court noted the problems confronting employer and employee in businesses where work hours fluctuate from week to week stating:

> "Many such employees value the security of a regular weekly income * * *. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours." See 316 U. S. 624, at 635.

This latter objective underlay the enactment of Section 7(e) but despite the clear Congressional purpose the Department of Labor has continued to take a position which in the language of *Belo* "as a practical matter eliminates the possibility of steady income to employees with irregular hours". As heretofore stated, under the Department's regulations a level income for an employee who works irregular hours can be attained, at most, only 80% of the time.

And the Department would hedge in even this limited benefit by other requirements so onerous that only the unusual employer would attempt to comply with the regulations. For example, an employer has the obligation to guess in

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[3] *McComb* v. *Utica Knitting Co.*, 164 F. 2d 670, 673 (2d Cir. 1947).

advance what hours his employees will work (this is so even though he is not permitted to use the contract at all unless his employees' duties are such that hours of work cannot accurately be predicted in advance). This guess, however honest, may prove entirely inaccurate if a change in business conditions or an unexpected emergency causes a change in working hours. Thus, no employer can ever be sure in advance whether his use of a guaranteed wage contract would be in violation of the Act. Since the Department will always have the advantage of hindsight in evaluating the employer's guess, the use of such a contract under the regulations will necessarily be at the employer's peril. Obviously the advantages of a guaranteed wage contract, namely a level income for the employee and predictability of labor costs for the employer can be realized only if the guaranteed period is considerably in excess of the average workweek. As the guaranteed period and the average workweek are brought closer together the advantages of the contract steadily decrease.

Furthermore, compliance with the regulations would complicate the employer's bookkeeping problems to an unwarranted extent. Not only would he be required to make a detailed analysis of his time records before introducing the use of a guaranteed contract but under Department regulations these records must be reviewed "at least every six months" and the guarantee revised to conform to the employer's guesses based on such a review.[4] Since the Department apparently contemplates that each employee's situation shall be analyzed separately, the employer would not be justified in treating together a number of employees who do similar work as is the case with all of respondent's 600

[4] 29 C. F. R., Ch. V Part 778.18(f) Interpretative Bulletin on Overtime Compensation.

inspectors, this despite the fact that Section 7(e) expressly authorizes a collective bargaining agreement.

CONCLUSION

The clear and unambiguous language of Section 7(e) should put an end to further attempts to perpetuate the confusion which lies in the petitioner's "significant number of workweeks" test. Four Courts of Appeals have so ruled; no Court of Appeals has disagreed. We respectfully submit that the petition for a writ of certiorari should be denied.

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